(1) Supreme Court, U.S.

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No. 00-

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IN THE

Supreme Court of the United States

ROSA M. TOWNSEND,

Petitioner,

vs.

KNIGHT-RIDDER, INC. and
THE MIAMI HERALD PUBLISHING CO.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

WILLIAM R. AMLONG
Counsel of Record
AMLONG & AMLONG, P.A.
Attorneys for Petitioner
500 Northeast Fourth Street
Second Floor
Ft. Lauderdale. FL 33301
(954) 462-1983

52 pp

QUESTION PRESENTED FOR REVIEW

I. Is an employee's good-faith complaint about discrimination protected from retaliation only if she has an "objectively reasonable" belief that terms and conditions of employment she opposes are actually illegal?

II. Does the "remedial" and "humane" enforcement scheme of the Fair Labor Standards Act permit retaliation against a worker who complains in good faith about wage-discrimination, even though it is not "objectively reasonable" to believe that the pay differential is illegal?

LIST OF PARTIES

The parties to the proceedings in the court whose judgment is sought to be reviewed here include those who appear in the caption of the case. There is no parent or subsidiary of any party to be listed.

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No.

In The

Supreme Court of the United States

ROSA M. TOWNSEND,

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vs.

KNIGHT-RIDDER, INC. and THE MIAMI HERALD PUBLISHING CO.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Rosa M. Townsend, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is not reported; it is reproduced in the Appendix filed herewith ("App.") at 1a. The opinion of the district court is not reported; it is reproduced in the Appendix at 2a.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit was rendered on October 20, 2000.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THIS CASE

The Equal Pay Act and the anti-retaliation provision of the Fair Labor Standards Act, 29 U.S.C. §§ 206(d) and 215(a)(3), respectively, and the anti-discrimination and anti-retaliation provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-2(a) and 2000e-3(a), respectively, are set forth below:

The applicable provision of the Equal Pay Act, 29 U.S.C. § 206(d), provides as follows:

Prohibition of sex discrimination

> (1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such

> establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee. . . .

The anti-retaliation provision of Fair Labor Standards Act, 29 U.S.C. § 215(a)(3), provides as follows:

> **Prohibited acts; prima facie evidence**
>
> (a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person —
>
> > (3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee;...

The anti-discrimination provision of Title VII, 42

U.S.C. § 2000e-2(a), provides as follows:

> **Unlawful employment practices**
>
> **(a) Employer practices**
>
> It shall be an unlawful employment practice for an employer —
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> >
> > (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. . . .

The anti-retaliation provisions of Title VII, 42 U.S.C. § 2000e-3(a), provide as follows:

> **Other unlawful employment practices**
>
> **(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings**
>
> It shall be an unlawful employment practice

for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT OF THE CASE

Plaintiff brought this action pursuant to the Equal Pay Act, 29 U.S.C. § 206(d), the retaliation provision of the Fair Labor Standards Act, 29 U.S.C. § 215(a)(3), the discrimination and retaliation provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, basing federal jurisdiction on the Fair Labor Standards Act, 29 U.S.C. §§ 216 (b) and 217, Title VII, 42 U.S.C. 2000e-5(f)(3), and 28 U.S.C. § 1331 (federal question).[1]

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[1]A parallel claim under the discrimination and retaliation provisions of the Florida Civil Rights Act of 1992, which is not at issue in this petition, was brought pursuant to the court's supplemental jurisdiction under 28 U.S.C. § 1367. Petitioner does not seek certiorari concerning her discrimination claims.

I. Facts[2]

Rosa M. Guzman, the highest-ranked, highest-paid reporter on the city desk of *el Nuevo Herald*, a Spanish-language insert to *The Miami Herald*, complained to publisher Alberto Ibarqüen that she was neither ranked as highly nor paid as much as Gerardo Reyes, a male reporter. Although Reyes previously had worked at *el Nuevo Herald*, he at the time was assigned to *The Miami Herald*'s Latin American desk. Townsend told Ibarqüen "that I felt that I was being discriminated against because of my work versus his work, versus his salary, and being a woman, he was a man. So there was no other reason, other than the sex."

Townsend complained to Ibarqüen March 13, 1998 following a generally favorable review during which she was given a two-step. 6.5 per cent pay raise, but during which her editors criticized some aspects of her performance and told her that she was not ready to be graded a Reporter 4, as was Reyes.

Ibarqüen became so angry that Townsend feared being fired immediately. Ibarqüen told Townsend at this point, "You first complain[ed] about sexual harassment. Now you're complaining about discrimination. What is next?"[3] Ibarqüen then told Townsend that "he will not

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[2]This recitation of facts is a condensation of the Plaintiff's Response to Defendants' Statement of Undisputed Facts, R-3-93, which cites to the deposition transcripts and other evidentiary materials upon which it relies.

[3]Townsend had complained internally several years earlier, but neither had sued nor had filed a Charge of Discrimination with the Equal Employment Opportunity Commission, concerning (continued...)

tolerate, period, he will not tolerate one more complaint about sexual harassment or discrimination."

Townsend on April 8, two days before going on vacation (until April 24), again asked Ibarqüen if he would reconsider her requests for a reclassification and an attendant pay-raise. After she returned from vacation, Townsend again asked Ibarqüen April 27 if he had reconsidered. Ibarqüen became extremely angry — accusing her of having "brought all sorts of complaints" and once again mentioning her complaints about discrimination and sexual harassment — and told her to get out of his office: "You better go back to the newsroom."

Following this final meeting, Ibarqüen called Townsend's supervisors and told them to terminate her.

Notwithstanding that Townsend's job performance had not deteriorated during the time that she had been objecting to the differences in how she and Reyes were graded and paid, Barbara Gutierrez, editor of *el Nuevo Herald*, and Roberto Fabricio, the managing editor, summoned Townsend to Gutierrez' office on Thursday, April 30 and, in the presence of a human resources representative, gave her a letter that read, in pertinent part:

> You have told both Alberto Ibarqüen and Roberto Fabricio that you cannot and will not accept our decision to retain the Reporter 3 classification of your position and not re-classify

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[3](...continued)
unwelcome sexual advances by an editor. The newspaper investigated and issued the editor a warning.

you as a Reporter 4 as you demanded.... *You also complained this was discriminatory and we have explained that in fact it was not....*

[Y]ou told Robert and Alfredo Casares[, the city editor,] that if the classification stood, you would not tolerate the situation.... When you returned from vacation, you repeated to Alberto Ibarqüen your opposition to the job classification, which he told you would stand....

You have made your objections and your unhappiness evident and appear to be intent in undermining confidence in newsroom leadership. Your behavior is counter-productive and contrary to the best interest of a newsroom that requires teamwork and cooperation.

Rosa, we cannot allow this to continue....

You were told by Alberto that your refusal to accept the classification of your position and to perform as required would be viewed as a resignation and would be accepted. You also said this to Roberto, who acknowledged it and said he, too, would accept it as a resignation. In light of your conduct, the important nature of your job, and your performance, we are accepting your resignation or in the alternative terminating your employment effective May 8, 1998....

(Emphasis added.)

II. Procedural background

Rosa M. Townsend filed suit June 23, 1998 against

The Miami Herald Publishing Co., a corporation, and amended her complaint January 25, 1999 to add as a defendant Knight-Ridder, Inc., which publishes *The Miami Herald* and *el Nuevo Herald* through an unincorporated division known as The Miami Herald Publishing Co. She alleged discrimination under the Equal Pay Act (Count I), Title VII (Count III), and the Florida Civil Rights Act of 1992 (Count V), and retaliation pursuant to the Fair Labor Standards Act (Count II), Title VII (Count IV) and the Florida act (Count VI).

Defendants moved for summary judgment, which the district court granted as to all counts. Not only did the district court find that there were legitimate reasons for ranking Reyes higher than Townsend, and paying him more than her, but it also concluded that her assessment of herself as Reyes' equal was not objectively reasonable given the difference in their assignments, i.e., local vs. Latin America. App. 21a-25a In so holding, however, it noted that "Knight Ridder does not deny that Ms. Townsend's protests were made in good faith." App. 24a.

Following oral argument, a panel of the United States Court of Appeals for the Eleventh Circuit issued a per-curiam affirmance without any opinion. App. 1.

REASONS FOR GRANTING THE WRIT.

I.

The United States Court of Appeals for the Eleventh Circuit entered a decision that conflicts with decisions of the Tenth Circuit concerning the standard to be used in Title VII opposition-clause cases.

The United States Court of Appeals for the Eleventh Circuit requires that any opposition to a perceived unlawful employment practice be — in addition to being made in "good faith" — "objectively reasonable" if it is to enjoy protection under Title VII's anti-retaliation provision. *See Clover v. Total Systems Services, Inc.*, 176 F.3d 1346, 1351 (11thCir. 1999) (plaintiff's statements to internal investigators about older male manager's flirtatious come-ons to young female employee did not qualify for protection because the behavior did not qualify as sexual harassment); *Little v. United Technologies, Carrier Transicold Division*, 103 F.2d 956, 960 (11th Cir. 1997) (plaintiff's reporting of co-worker's racial slur during team meeting did not qualify as protected activity because corporation could not have been held liable for co-worker's behavior). The district court relied upon *Clover* and *Little* in granting defendant's motion for summary judgment. App. B, at 21a-25a.

This standard goes beyond the simple "good faith" standard adopted by the United States Court of Appeals for the Tenth Circuit for the opposition clause. In reversing a summary judgment concerning a former hospital chaplain's informal complaints about what, it turned out, was really not actionable sexual harassment, the court in *Jeffries v. State of Kansas*, 147 F.3d 1220 (10th Cir. 1998) expanded upon a case from the First Circuit[4] that had held that to be protected by the *participation* clause, "there is nothing in the wording of the statute requiring that the charges be valid, not even an implied requirement that they be reasonable." (Citations, brackets and internal quotation marks omitted.) Previously, in *Love v. RE/MAX of America, Inc.*, 738 F.2d 383 (10th Cir.1984), a case in which the cause-and-effect

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[4] *Wyatt v. City of Boston*, 35 F.3d 15, 15 (1st Cir. 1994).

sequence of the complaint and termination was similar to the one at bar,[5] the same court had rejected a defense contention "that Love's good faith belief was not legally sufficient to state a retaliation claim under the opposition clause," 738 F.2d at 385, and held "that a good faith belief is sufficient." *Id.*

While the *Love* court stated that "[e]very circuit that has considered the issue...has concluded that opposition activity is protected when it is based on a mistaken good faith belief that Title VII has been

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[5]The *Love* court recited as follows:

> The claim of retaliatory discharge is based on the following undisputed facts. Love was hired by RE/MAX in February 1978 as director of advertising. She was named vice president for advertising in February 1979, but was not given a raise in pay until April 1979. During this time Love discovered that male vice presidents had received larger starting salaries than she. In December 1979, Love was told that her projects were unacceptably over budget, and that if she went over budget again she would be fired. Love agreed to keep costs down. In March 1980, Love learned that male employees of RE/MAX in positions she believed were comparable to hers had been given substantial raises the previous November although she had not. Love asked the company president, Gail Main, for a performance review and indicated her desire for a pay raise. She was told at the end of March that the company was not happy with her work and that she would not get a raise. On April 18, 1980, Love wrote a memo to the president requesting a raise. She attached a copy of the Equal Pay Act to the memo. Within two hours the chief executive officer of RE/MAX, Dave Liniger, went to her office with the memo and fired her.
>
> 738 F.2d at 385.

violated," *id.*,[6] each of the cases upon which it relied discussed the "good faith" belief in the context of its being "reasonable." The difference between the Tenth Circuit's "good faith" approach and the Eleventh Circuits' "objectively reasonable"[7] standard, however, was highlighted recently in an unpublished opinion[8] in which a panel of the Tenth Circuit reversed a summary judgment based on *Little*, citing *Jeffries* and *Love* and stating that "[t]he district court mischaracterized our standard when it stated that the belief that antidiscrimination law has been violated must not only be subjectively in good faith, but objectively reasonable, citing Eleventh Circuit authority."

The importance in adopting the Tenth Circuit's "good faith" standard, as opposed to the Eleventh Circuit's "objectively reasonable" rule is that while the "good faith" standard would protect employers from "an employee who makes unfounded claims of discrimination in order to excuse non-compliance with legitimate employer

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[6]The *Love* court cited the following cases: *Rucker v. Higher Educational Aids Board*, 669 F.2d 1179, 1182 (7th Cir.1982); *Sisco v. J.S. Alberici Construction Co.*, 655 F.2d 146, 150 (8th Cir.1981), *cert. denied*, 455 U.S. 976, 102 S.Ct. 1485, 71 L.Ed.2d 688 (1982); *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1137-40 (5th Cir.1981), *cert. denied*, 455 U.S. 1000, 102 S.Ct. 1630, 71 L.Ed.2d 866 (1982); *Parker v. Baltimore & Ohio Railroad Co.*, 652 F.2d 1012, 1019 (D.C.Cir.1981); *Monteiro v. Poole Silver Co.*, 615 F.2d 4, 8 (1st Cir.1980); *Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir.1978); and *Mitchell v. Visser*, 529 F.Supp. 1034, 1043 (D.Kan.1981)

[7]*Clover*, 176 F.3d at 1351; *Little*, 103 F.3d at 960.

[8]*Shinwari v. Raytheon Aircraft Co.*, Case No. 98-3324, 2000 WL 731782 (10th Cir. June 8, 2000), *cert. denied*, __ U.S. __, 2001 WL 13219, 69 USLW 3281 (Jan 08, 2001).

demands," *Montiero v. Poole Silver Co.*, 615 F. 4, 8 (1st Cir. 1980) (affirming trial court that rejected employee's complaints as "having been raised as a smokescreen in challenge to the supervisor's legitimate criticism"), it also would be "consistent with a liberal construction of Title VII to implement the Congressional purpose of eliminating discrimination in employment." *Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978) (holding that employee is entitled to opposition-clause protection even when mistaken to the facts about which he complains). The "good faith" approach is consistent with what this Court has stated, in the context of the retaliation provision of the Fair Labor Standards Act (FLSA), is a self-policing enforcement scheme for the American workplace that depends upon "employees [feeling] free to approach officials with their grievances." *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 292 (1960). The imposition of the "objectively reasonable" standard, on the other hand, would require employees suspecting discrimination to bet their very livelihoods that the situation about which they complain actually is illegal — even though they, as did Townsend, complain in subjective good faith. Such a rule effects a social policy contrary to what the Court found in *Mitchell* that Congress had intended. As this Court observed, "it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved individuals quietly to accept substandard conditions." *Id.* The Tenth Circuit's "good faith" rule effectuates the correct policy.

This Court should resolve the circuit split — and should do so in favor of the Tenth Circuit's "good faith" approach.

II.

The United States Court of Appeals for the Eleventh Circuit has decided an important question of federal law concerning retaliation for the assertion of federally protected rights in the work place in a way that is inconsistent with this Court's interpretation of the Fair Labor Standards Act and Title VII of the Civil Rights Act of 1964.

The Eleventh Circuit's requirement that opposition to unlawful employee practices be "objectively reasonable" if the complaining employee is to enjoy any protection against retaliation — the application of which requirement was fatal to Townsend's claims, notwithstanding that no one disputed that she had made her complaints in subjective good faith — is inconsistent with:

One, the self-policing "climate" that this court recognized in *Mitchell*, 361 U.S. at 336;

Two, the requirement that any worker who feels she is subject to such non-economic discrimination as sexual harassment "avail herself of the employer's preventive or remedial apparatus" prior to taking her claim to court, *see Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); and

Three, especially as it relates to retaliation for having raised an issue pursuant to the Equal Pay Act, which Congress amended onto the FLSA, what this Court has recognized as the "remedial" and "humanitarian" aims of Congress' regulation of the workplace. *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597

(1944) (declaring that the FLSA "must not be interpreted in a narrow, grudging manner" and holding that ore miners' on-the-job, below-surface travel time was on the clock for purposes of wage-and-hour computations).

Other courts of appeal have taken a cue from such holdings and have adopted an aggressive enforcement of the FLSA, consistent with what this Court has found to be the underlying congressional purpose of federal workplace legislation.

The FLSA, as well as the National Labor Relations Act, "which was cut out of the same cloth of social legislation as the FLSA in the 1930s and has been used an interpretative aid in analyzing provisions of the FLSA," *Saffels v. Rice*, 40 F.3d 1546, 1549 (8th Cir. 1994), for example, have been interpreted so expansively as to provide anti-retaliation protection even to persons who did not engage in any of their remedies, but only were thought mistakenly by their employers to have done so. *See Saffels* and *Brock v. Richardson*, 812 F.2d 121, 124 (34d Cr. 1987) (mistaken believe that employees had complained about violations of FLSA sufficient to trigger protection of 29 U.S.C. § 215(a)(3)); *Holyoke Visiting Nurses Association v. National Labor Relations Board*, 11 F.3d 302, 307 (1st Cir. 1993) (affirming finding in favor of nurse who was mistakenly thought to be union sympathizer because "proof of an unfair labor practice does not require proof of actual union activity; it is sufficient if the employer was motivated by suspected union activity in discharging the employee").

Likewise, the court in *Goldberg v. Bama Mfg. Corp.*,302 F.2d 152 (5th Cir. 1962) held that a district court abused its discretion by not ordering relief for an incompetent, dishonest employee who "probably ought"

to have been fired for half a dozen reasons, where the firing was motivated in part by the assertion of her statutory rights. 302 F.2d at 153. The court explained as follows:

> [T]he purposes of the Fair Labor Standards Act require that employees throughout the country feel confident that they may bring a complaint to the Department of Labor without being penalized by their employers.... The conspicuous feature of the district court decision which must impress employees is that Bama discharged an employee in violation of the Act and the district court allowed the employer to get away with it scot free. Many employees may not appreciate the extent of Mrs. Powell's misconduct. At least to some degree, therefore, the feeling of confidence in the assertion of statutory rights, so vital to the Act's enforcement, may be shaken. We think that the trial judge exceeded the bounds of sound judicial discretion in denying both reinstatement and reimbursement.

302 F.2d 152, 156 (5th Cir. 1962).

Not to grant certiorari and to reverse the district court and the court of appeals in this case would send to the employees of Knight-Ridder, Inc. at *The Miami Herald* and *el Nuevo Herald*, as well as other workers within the Eleventh Circuit, the message that even if they feel that they were being treated illegally at work, they would be wiser to "decide that matters had best be left as they are." *Mitchell*, 361 U.S. at 293.

CONCLUSION

Based on the authorities cited and the argument presented, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

WILLIAM R. AMLONG
Counsel of Record
AMLONG & AMLONG, P.A.
Attorneys for Petitioner
500 Northeast Fourth Street
Second Floor
Fort Lauderdale, Florida 33301
(954) 462-1983

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED OCTOBER 20, 2000

United States Court of Appeals,

Eleventh Circuit.

ROSA M. TOWNSEND,

Plaintiff-Appellee,

versus.

THE MIAMI-HERALD PUBLISHING COMPANY, KNIGHT-RIDDER, INC.,

Defendants-Appellants.

(October 20, 2000)

Appeal from the United States District Court for the Southern District of Florida

Before EDMONDSON, WILSON and MAGILL*, Circuit Judges.

PER CURIAM:

AFFIRMED. See Eleventh Circuit Rule 36-1.

* Hon. Frank J. Magill, U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

APPENDIX B – ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED JANUARY 31, 2000.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

Case No. 98-1485-CIV-JORDAN

ROSA M. TOWNSEND,

Plaintiff.,

vs.

KNIGHT RIDDER, INC., and THE MIAMI HERALD PUBLISHING CO.,

Defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiff Rosa M. Townsend sues her former employers, Knight Ridder, Inc., and The Miami Herald Publishing Company, for alleged discrimination and retaliation under the Equal Pay Act ("EPA"), 29 U.S.C. § 206(d) (Count I), the anti-retaliation provisions of the Fair Labor Standards Act, 29 U.S.C. § 215(a)(3) (Count II), Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991 (Counts III & IV), 42 U.S.C. 2000e *et seq.*, and the Florida Civil Rights Act of 1992 ("FCRA") (Counts V & VI) [D.E. 36]. Ms. Townsend

alleges that Knight Ridder and The Miami Herald Publishing Company discriminated against her because of her sex and bring claims for wage discrimination, failure to promote, and retaliatory discharge.

I. Jurisdiction and Procedural Posture

This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331; § 16(b) and 17 of the Fair Labor Standard Act, as amended, 29 U.S.C. § 216(b) & 217; and § 706(f) of the Civil Rights Act of 1964, 42 U.S.C. 2000e(5)(f). This Court also has supplemental jurisdiction over Ms. Townsend's state law claims under 28 U.S.C. § 1367.

Knight Ridder and the Miami Herald Publishing Company move for summary judgment on all of Ms. Townsend's discrimination and retaliation claims. *See* Motion for Summary Judgment of Knight Ridder and Miami Herald Publishing Company [D.E. 70] (Sept. 3, 1999). Summary judgment is appropriate if pleadings, depositions, and affidavits show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (quoting Fed. R. Civ. P. 56(c)). An issue of fact is "material" if it is a legal element of the claim under the applicable substantive law which might affect the outcome of the case, and it is "genuine" if the record taken as a whole could lead a rational trier of fact to find for the nonmoving party. *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir. 1997). The Court must therefore view the evidence and all factual inferences therefrom in the light most favorable to Ms. Townsend. *Id.* Ms. Townsend, however, bears the burden of coming forward with persuasive evidence on each essential element of her claims such that a reasonable jury could find in her favor. *Anderson v. Liberty Lobby, Inc.*,

477 U.S. 242, 247-48 (1986) (a mere "scintilla of evidence" is not enough); *Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1080 (11th Cir. 1990); *see also Mayfield v. Patterson Pump Co.*, 101 F.3d 1371, 1376 (11th Cir.1996) (conclusory allegations and conjecture cannot be the basis for denying summary judgment).

II. Facts

On June 10, 1988, Rosa Townsend was hired as a copy editor for *el Nuevo Herald*. At all relevant times, *el Nuevo Herald* was the Spanish-language insert to *The Miami Herald*. It has since become a separate publication. *See* Declaration of *Miami Herald* Publisher, Alberto Ibarqüen ¶2 at 1 [D.E. 72, Attachment 4] (Sept. 3, 1999). At all times, *el Nuevo Herald* and *The Miami Herald* were operated separately, although they shared some resources. *See id.* ¶3 at 2. Knight Ridder owns both newspapers. Ms. Townsend alleges that the Miami Herald Publishing Company is also an employer of the reporters of those newspapers, although the Miami Herald Publishing Company denies having any employees.

At the time relevant to this suit, Ms. Townsend reported directly to the assistant city editor, Gladys Nieves, and later José Cabaleiro, or to the city editor, Alfredo Casares. The managing editor, Robert Fabricio, supervised the city editor and the editor, Barbara Guitierrez, supervised the managing editor. The publisher of *el Nuevo Herald*, Alberto Ibarqüen, was the ultimate supervisor.

Reporters at *el Nuevo Herald* and *The Miami Herald* were classified from Reporter 1, the lowest rank; to Reporter 4, the highest rank. A Reporter 3 is paid anywhere from $750 to $1126 per week, while a Reporter

4 earns between $975 and $1463 per week. According to Knight Ridder's job description, a Reporter 4 must have the skills of Reporters 1, 2, and 3, plus the following:

> [Reports and writes a wide range of stories with minimal supervision, whether on short or long-term assignments or projects. Has superior writing skills (flawless copy). Is expected to generate enterprise stories. Analyzes complex records with expertise. Possesses specialized knowledge and/or contacts. May serve as critic or columnist. [Is] proficien[t] in English and Spanish.

Reporter 4 Job Description [D.E. 72, Attachment 16] (April 11, 1994).

In 1991, Ms. Townsend was assigned to be a travel editor, and four years later was assigned to work as an investigative reporter and classified as a Reporter 3. As an investigative reporter, Ms. Townsend covered politics and legislation all over Florida, although she mostly handled local city politics in Miami, reporting on city commission meetings, mayoral races, and other newsworthy events in the city. In March of 1997, Ms. Townsend was earning $978 per week and in March of 1998 she received a raise to $1007 per week.

In the fall of 1997, Ms. Townsend's supervisors prepared an evaluation of her performance for that year. In March of 1998, Mr. Casares and Mr. Cabaliero met with Ms. Townsend to present and discuss her performance and give her a 6.5 percent raise. The evaluation represented a consensus of all of Ms. Townsend's supervisors, excluding Mr. Ibarqüen, who does not

participate in employee evaluations.[1] The evaluation noted several of Ms. Townsend's strengths as an investigative reporter, but also offered criticisms and areas of improvement with respect to her writing and communication skills. For example, the evaluation stated that Ms. Townsend needed to organize her time more effectively; that she tended to get bogged down in details and over-report; that she needed to write faster and more clearly; that she needed to improve her ability to work as part of a team; and that she had an overly defensive attitude, *See* Newsroom Performance Evaluation of Rosa Townsend [D.E. 71, Attachment 1, Exhibit 1] (Oct. 1, 1997). Ms. Townsend disagreed with these criticisms and refused to sign the evaluation. In addition Ms. Townsend demanded a larger wage increase and asked that she be promoted from Reporter 3 to Reporter 4.

A few days later, on March 13, 1998, Ms. Townsend met with Mr. Ibarqüen to discuss her evaluation and her desire to be promoted to Reporter 4. Ms. Townsend complained that she should be paid the same salary as Gerardo Reyes, a report for *The Miami Herald*, and that the newspaper's failure to pay her an equal salary was sex

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[1] Ms. Nieves began preparation of the evaluation, but subsequently left *el Nuevo Herald* and handed over the finalizing of the evaluation to Mr. Cabaliero. Ms. Nieves has since read the final evaluation and agrees with every substantive point made in it. Ms. Nieves also agrees that, as of the time she left *el Nuevo Herald*, Ms. Townsend's performance did not merit a promotion to Reporter 4. *See* Declaration of Gladys Nieves ¶ 4 [D.E. 72, Attachment 5] (Sept. 1, 1999).

discrimination.[2] Mr. Ibarqüen disagreed, stating that her status as Reporter 3 was based on her supervisors' assessment of her performance. According to Ms. Townsend, Mr. Ibarqüen told her that she was chronically complaining and said: "I will not tolerate you accusing us of discriminating against you. You first brought a sexual harassment complaint. Now discrimination. What's next?" *See* Deposition of Rosa Townsend at 127 [D.E. 69] (Aug. 10, 1999). Mr. Ibarqüen does not recall using these words, *see* Ibarqüen Declaration ¶ 8 at 5, but the Court must assume he made the statement for purposes of

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[2] Ms. Townsend's discrimination complaint is based on her belief that she should be paid the same as Mr. Reyes. That was the substance of her first conversation with Mr. Ibarqüen:

> What I said was that I think I deserve to be Reporter 4, and I would like him to reconsider my position because my evaluation — I received the evaluation prior day and my request was ignored and, therefore, I would like to him to reconsider and to do an investigation into what I was saying, to review carefully my merits on that. And, of course, I said I compare myself to Gerardo Reyes and said that I felt that I was being discriminated against because of my work versus his work, versus his salary, and being a woman, he was a man. So there was no reason, other than the sex. And I brought that to him.

Townsend Deposition at 125-26.

deciding this motion.

Mr. Ibarqüen then met with Mr. Casares, Mr. Fabricio and Ms. Gutierrez, and after discussing Ms. Townsend's qualifications, they concurred that she did not meet the standards for a promotion to Reporter 4. On April 7, 1998, Mr. Fabricio and Mr. Casares met with Ms. Townsend and provided her a memo explaining their reasons for not promoting her which echoed the criticisms in the evaluation. The memo also provided suggestions to assist her in developing the skills that would facilitate a promotion to Reporter 4.

Ms. Townsend went to see Mr. Ibarqüen two more times, once a few days after the meeting with Mr. Fabricio and Mr. Casares, and once on April 27, 1998. During those meetings, Ms. Townsend reiterated her belief that she should be promoted immediately, and Mr. Ibarqüen repeated that the consensus of the editors was that she remain a Reporter 3. Ms. Townsend's final meeting with Mr. Ibarqüen lasted ten to fifteen minutes. *See* Townsend Deposition at 142. Ms. Townsend sought out Mr. Ibarqüen to find out whether he had investigated her prior complaints and had reconsidered whether she should be promoted. *See id.* At 143-144. Mr. Ibarqüen was not receptive to her contention that the reason she was not a Reporter 4 like Mr. Reyes was sex discrimination. According to Mr. Ibarqüen, Ms. Townsend stated that the conditions imposed on her were intolerable and that her supervisors were not treating her fairly. He suggested that she speak with Amalio Carneiro, the vice president of human resources, whose job it was to investigate employee complaints. *See* Ibarqüen Declaration ¶ 14 at 8-9.

While Ms. Townsend was complaining about her

supervisors to Mr. Ibarqüen, her supervisors were growing increasingly dissatisfied with what they perceived as her insubordinate attitude. *See* Declaration of City Editor Alfredo Casares ¶¶ 11, 13, 15 & 16 at 3-5 [D.E. 72, Attachment 1] (Aug. 2, 1999); Declaration of Managing Editor Roberto Fabricio ¶¶ 5, 7 & 8 at 2-5 [D.E. 72, Attachment 2] (Sept. 2, 1999). As a result, Mr. Ibarqüen, Mr. Fabricio, and Ms. Gutierrez determined to interpret this alleged insubordination as a resignation or as a basis for her termination. *See* Ibarqüen Declaration ¶ 15 at 9; Fabricio Declaration ¶ 7 at 4; Declaration of Editor Barbara Gutierrez ¶ 6 at 3 [D.E. 72, Attachment 3] (Sept. 2, 1999). Ms. Townsend was terminated on April 30, 1998.

Ms. Townsend's contention that she should have been paid as much as Mr. Reyes is based on her belief that they began working for the defendants at roughly the same time and had similar experience. *See* Townsend Deposition at 239. Ms. Townsend concedes, however, that she never investigated Mr. Reyes' qualifications or experience and that her knowledge about his experiences comes entirely from her recollection of scattered conversations she has had with him and unnamed others "throughout the years." Townsend Deposition at 240-41.

During 1997 and 1998, Mr. Reyes was a reporter for *The Miami Herald* and was a Reporter 4 assigned to the Latin American desk. He was earning $1,154 per week in May of 1997 and $1,183 per week in May of 1998. Mr. Reyes worked on local storied concerning Miami politics, but his primary responsibility was covering Latin American politics. Born in Colombia, Mr. Reyes holds a law degree and used to work for a leading Colombian daily newspaper. According to Mr. Reyes and Mr. Ibarqüen, Mr. Reyes' job requires extensive background and

experience in Latin American politics and a network of contacts at high levels of government or business. Mr. Reyes has worn several awards for achievement in journalism and had headed up professional organizations for investigative reporters.

III. Miami Herald Publishing Company's Motion for Summary Judgment on All Counts

Defendant Miami Herald Publishing Company ("MHPC") moves for summary judgment on all counts, claiming that it was never Ms. Townsend's employer. Ms. Townsend argues that she is employed by MHPC because the Federal Employee Identification Number ("EIN") and her IRS Form W-4 is the same MPHC's EIN number used to file reports with the Florida Secretary of State. *See* Plaintiff Rosa Townsend's Response to Defendants' Statement of Undisputed Facts ("Plaintiff's Response"), at 14 & Attachments 24, 25 [D.E. 93, 91] (November 3, 1999). MHPC states that EIN number listed with the Secretary of State is in fact Knight Ridder's number, and the filing of MHPC reports under this number was the result of administrative error. *See* Declaration of Lynda Hauswirth ¶ 9 [D.E. 95, Attachment 4] (January 15, 1999). MHPC explains that it shares the same name with Knight Ridder's unincorporated division. Knight Ridder contends that MHPC does not publish either newspaper and has neither assets nor employees. *See* Hauswirth Declaration ¶ 8. The Court finds that there is a genuine issue of material fact regarding whether MHPC employed Ms. Townsend. Accordingly, the Court will assume that both MHPC and Knight Ridder employed Ms. Townsend for purposes of the defendants' remaining arguments.

For the remainder of this opinion, "Knight Ridder" shall be understood to refer to both defendants. The

action so the editors of *el Nuevo Herald* and *The Miami Herald* will be deemed attributable to both Knight Ridder and MHPC. *See, e.g., Vernon v. Medical Management Assocs. of Margate*, 912 F. Supp. 1549, 1555 (S.D. Fla. 1996) (holding that employers are liable for act of discrimination by their agents).

IV. Equal Pay Act

Ms. Townsend claims that Knight Ridder discriminated against her in violation of the Equal Pay Act ("EPA") 29 U.S.C. § 206(d). The EPA states:

> No employer . . . shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishments at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work in jobs the performance of which requires equal skill, effort, and responsibility and which are performed under similar working conditions, excerpt where such payment is made pursuant to . . . (iv) a differential based on any other factor other than sex . . . .

29 U.S.C. § 206(d).

After reviewing the undisputed facts in light of the relevant case law, the Court finds that Ms. Townsend is unable to state a prima facie case for discrimination under the EPA because her work and Mr. Reyes' work do not require "equal skill, effort, and responsibility." Moreover, even if Ms. Townsend were able to state a prima facie case of discrimination under the EPA, she does not offer sufficient evidence to rebut Knight Ridder's showing that

the decision to pay her a lesser wage was based on factors other than sex.

A. Prima Facie Test under the EPA

To state a prima facie case of discrimination under the EPA, Ms. Townsend must show that her employer "pays different wages to employees of opposite sexes 'for equal work on jobs the performance of which requires equal skill, effort, and responsibility." *Mulhall v. Advance Security, Inc.*, 19 F.3d 586, 590 (11th Cir. 1994) (quoting *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974)). In addition, Ms. Townsend must show that she worked in the same "establishment" as those employees against whom she seeks to compare herself. *See id.* Although Ms. Townsend does not have to prove that the jobs are identical, she has the "heavy burden of proving substantial identity of job functions." *Waters v. Turner, Wood & Smith Ins. Agency, Inc.*, 874 F.2d 797, 799 (11th Cir. 1989) (quoting *Brennan v. City Stores, Inc.*, 479 F.2d 235, 238 (5th Cir. 1973). In determining whether the jobs are substantially identical, courts compare the jobs, and not the individual employees holding those jobs. *See Mulhall*, 19 F.3d at 592; *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1534 (11th Cir. 1992). Courts consider only the "skills and qualifications actually needed to perform the jobs." *Miranda*, 975 F.2d at 592. If Ms. Townsend is able to satisfy these tests as applied to even just one comparator, she establishes a prima facie case for violation of the EPA. *See Mulhall*, 19 F.3d at 590.

The Court finds that Mr. Reyes is not a "comparator" for Ms. Townsend under the EPA. Although Knight Ridder disputes that *el Nuevo Herald* and *The Miami Herald* are the same "establishment" under the

EPA, the Court will assume that they are for purposes of analysis under the EPA. Nevertheless, although Ms. Townsend and Mr. Reyes were both investigative reporters who wrote and investigated stories that were published in *The Miami Herald* and *el Nuevo Herald*, their day-to-day responsibilities, skills, and effort differed in several basic ways. Mr. Reyes was a reporter on Latin American desk for *The Miami Herald*, whereas Ms. Townsend handled mainly local stories for *el Nuevo Herald*.

Mr. Reyes' job required extensive experience in Latin American politics, a knowledge of the laws of several Latin American countries, a familiarity with Latin American governmental process, and a network of contacts, many at high levels of government or business. *See* Declaration of Gerardo Reyes ¶ 4 [D.E. 72, Attachment 6] (Sept. 6, 1999); Ibarqüen Declaration ¶ 10 (stating that Mr. Reyes' "job required a background of the countries' culture, knowledge of their legal systems, including electoral laws, knowledge of the political environments, and highly placed, credible sources, official and otherwise"). Although Mr. Reyes also covered local stories, his additional responsibilities for international stories distinguish him from the work of exclusively local reporters like Ms. Townsend. For example, Mr. Reyes was often required to travel abroad for his stories. *See* Reyes Declaration ¶ 4; Ibarqüen Declaration ¶ 10. The record evidence shows that Mr. Reyes traveled to international cities and countries such as San Juan, Quito, Panama, Lima, Cali, Honduras, Bogota, and Aruba for stories. *See* Summary of Gerado Reyes' Investigative Latin Desk Stores [D.E. 91, Attachment 13].

Ms. Townsend does not present evidence that she has comparable skills, specialized knowledge, or contacts.

As a reporter for *el Nuevo Herald*, Ms. Townsend covered mostly local city politics and occasionally handled politics and legislation for Florida. *See* Townsend Deposition at 25. Ms. Townsend's work as a local reporter includes covering city commissions, mayoral races, and "things that were happening in the city of Miami." *Id.* Ms. Townsend does not present any evidence that her job required specialized knowledge or skills comparable to those required for Mr. Reyes' position. Outside of four or five trips to Tallahassee, Florida, in two years, Ms. Townsend offers no evidence of travel requirements for her job.

Ms. Townsend contends that her work is comparable to Mr. Reyes because she produced an equal number of stories published in *The Miami Herald* and a greater number of stories overall. *See* Plaintiff's Response [D.E. 91] at 5-6. While the number of stories produced may be one indicator of the amount of effort required of a reporter, Ms. Townsend concedes that writing stories is just one aspect of the job. Presumably, much time is spent gathering information as well as writing stories. An investigative reporter would be expected to spend more time reporting and less time writing and, consequently, to publish less frequently. For example, Ms. Townsend had to attend city commission meetings regularly to gather information for her stories. *See* Townsend Deposition at 26. Ms. Townsend has no idea what Mr. Reyes was doing day-to-day to report the news and bases her comparison only on what he published. *See* Townsend Deposition at 68. Accordingly, the Court finds that Ms. Townsend's statement that her job required equal skill and more work than Mr. Reyes, *see* Townsend Deposition at 66, is conclusory and not based on any personal knowledge other than the number of stories published by Mr. Reyes, a fact minimally probative of the skill and effort required

of a reporter.

In sum, Ms. Townsend has failed to provide sufficient evidence to show that her work as a local reporter requires equal skill, effort, and responsibility as Mr. Reyes' work on the Latin American desk and has therefore failed to establish a prima facie case of discrimination under the EPA.

B. Factors Other than Sex

Even if Ms. Townsend were able to provide sufficient evidence for a prima facie case of discrimination, the Court finds that Knight Ridder has shown that its decision was based on "factors other than sex." Once a plaintiff establishes a prima facie case, the burden then shifts to the employer to prove by a preponderance of the evidence that the difference in pay is justified by one of the four exceptions to the EPA. *See Irby v. Bittick*, 44 F.3d 949, 954 (11th Cir. 1995); *Mulhall*, 19 F.3d at 590. One exception allows Knight Ridder to show that it based its employment decision on "a differential based on any other factor other than sex." 29 U.S.C. § 206(d)(1)(iv). Knight Ridder's burden is a "heavy one" because it must show "that the factor of sex provided no basis for the wage differential." *Irby*, 44 F.3d at 954 (quoting *Mulhall*, 19 F.3d at 590). If Knight Ridder meets this burden, Ms. Townsend may rebut the explanation by showing with affirmative evidence that Knight Ridder's reasons is pretextual or offered as post-event justification for a gender-based differential. *See Irby*, 44 F.3d at 954; *Schwartz V. Florida Bd. Of Regents*, 954 F.2d 620, 623 (11th Cir. 1991) (per curiam).

An employer bases its decision on "any factor other than sex" when there is a pay differential based on

"unique characteristics of the same job; . . . an individual's experience, training or ability; or . . . special exigent circumstances of the same job; . . . an individual's experience, training or ability; or . . . special exigent circumstances connected with the business. *Irby v. Bittick*, 44 F.3d at 955 (quoting *Glenn Motors Corp.*, 841 F.2d 1567, 1571 (11th Cir. 1988), and finding that comparator's unique long-term experience was a justification for pay difference under the EPA as a "factor other than sex"); *see also Wu v. Thomas*, 847 F.2d 1480, 1485 (11th Cir. 1988). Where a pay differential is based on an employee's ability or performance, there is inevitably an element of subjectivity in the employer's decision. However, "provided that there are demonstrable reasons for the decision, unrelated to sex, subjectivity is permissible." *EEOC v. Aetna Ins. Co.*, 616 F.2d 719, 725 (4th Cir. 1980) (footnote omitted). "So long as subjective business justifications, not part of a merit system, are not overly subjective so as to render them incapable of being rebutted, they are legitimate factors to be considered." *Schwartz*, 954 F.2d at 624; *see also Fowler v. Blue Bell, Inc.*, 737 F.2d 1007, 1011 (11th Cir. 1984).

Knight Ridder asserts that it paid Mr. Reyes a higher salary because he was classified as a Reporter 4, whereas Ms. Townsend was classified as a Reporter 3. *See* Ibarqüen Declaration ¶ 10. To be classified as a Reporter 4, a reporter must have superior writing skills, be able to analyze complex records with expertise, possess specialized knowledge and/or contacts, have a college degree in journalism, and be proficient in English and Spanish. *See* Reporter 4 Job Description, [D.E. 72, Attachment 16]. Although Mr. Reyes' classification as Reporter 4 alone does not demonstrate that he was more qualified, Mr. Reyes' educational background, work experience, and 1997 Knight Ridder performance

evaluation supports Knight Ridder's assessment that he had the skills required to be a Reporter 4 and is entitled to relatively high pay. *See* Miami Herald Performance Evaluation of Gerardo Reyes [D.E. 91, Attachment 12] (Dec. 6, 1997). Mr. Reyes holds a law degree and maintained a successful journalism career with a leading Colombian newspaper before working for the Herald. *See* Reyes Declaration ¶ 4. He has won several journalism awards, has taught classes in investigative journalism, and has headed up professional organizations for investigative reporters. *See id.* ¶ 5. Although the evaluation suggests areas for improvement, it evidences Mr. Reyes' specialized skills and experience in Latin American journalism. *See id.* ¶ 4; Performance Evaluation [D.E. 91, Attachment 12].

In contrast, Ms. Townsend's supervisors unanimously agreed that Ms. Townsend was not qualified to be a Reporter 4. *See* Casares Declaration ¶ 8; Fabricio Declaration ¶¶ 2, 3, 5; Gutierrez Declaration ¶ 2; Ibarqüen Declaration at ¶¶ 4, 5; Nieves Declaration ¶¶ 3, 4. They concurred that she was an above-average Reporter 3, but needed to make certain improvements in order to be promoted to Reporter 4. In support of their conclusion, her supervisors cited weaknesses in her writing ability, her initiative and creativity, her ability to meet deadlines, and her attitude. *See* Rosa Townsend Performance Evaluation; Memo to Rosa Townsend from Alfredo Caseres and Robert Fabricio [D.E. 72, Attachment 1, Exhibits 1 & 2] (April 7, 1998). Accordingly, Knight Ridder has satisfied its burden of proving that it based its decision to pay Mr. Reyes a higher salary than Ms. Townsend on "factors other than sex."

Ms. Townsend may rebut Knight Ridder's explanation for the pay disparity by showing with affirmative evidence that Knight Ridder's reason is

pretextual. *See Irby*, 44 F.3d 954; *Swartz* (sic), 954 F.2d at 623. Although Ms. Townsend disagrees with her supervisors' assessment of her abilities, outside of her own conclusions, she offers no other rebuttal evidence.

> The inquiry into pretext centers upon the employer's beliefs, and not the employee's own perceptions of his performance. . . . Where an employer produced performance reviews . . . and other documentation that demonstrate poor performance, an employee's assertion of his own good performance are insufficient to defeat summary judgment, in the absence of other evidence.

Holifield v. Reno, 115 F.3d 1555, 1565 (11th Cir. 1997) (citations omitted). Thus, even assuming that she established a prima facie case, Ms. Townsend failed to create an issue of material fact regarding her employer's reason for not promoting her to Reporter 4. Knight Ridder's motion for summary judgment on Count I of Ms. Townsend's amended complaint is GRANTED.

V. Title VII

Knight Ridder also moves for summary judgment on Ms. Townsend's claims that Knight Ridder violated Title VII by failing to promote her to Reporter 4 and by paying her a lesser wage than Mr. Reyes. Because Knight Ridder offers the same business reason for both of these claims, the Court will analyze the claims together.

Under Title VII, it is unlawful for an employer "to discriminate against any individual with respect to his compensation . . . because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1). A party may rely on direct or

circumstantial evidence to prove intentional discrimination. *See Nix v. WLCY Radio/Rahall Communications*, 738 F.2d 1181, 1184 (11th Cir. 1984). Where a party relies on circumstantial evidence to show discriminatory intent, courts generally adhere to the *McDonnell Douglas-Burdine* framework. *See Holifield*, 115 F.3d at 1561-62. For purposes of deciding the Title VII claims, the Court will assume that Ms. Townsend has stated a prima facie case of discrimination.[3] The burden

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[3] To state a prima facie case of discrimination for failure to promote Ms. Townsend must show that (1) she belongs to a protected class; (2) she was qualified for and applied for a promotion; (3) she was not promoted; and (4) after her rejection, the position remained open and the employer continued to seek similarly qualified applicants. *See McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Maddox v. Claytor*, 764 F.2d 1539, 1546 (11th Cir. 1985).

Knight Ridder argues that Ms. Townsend does not meet the prima facie requirements because she cannot produce any evidence that she was qualified for the position of Reporter 4. The determination of whether a employee is qualified for a promotion to Reporter 4 is almost entirely based on the subjective evaluation of the employee by the editors and supervisors of Knight Ridder. Where an employer bases the decision to promote an employee on entirely subjective criteria, the *McDonnell Douglas* test becomes an unrealistic standard because the plaintiff's burden of proving that she is qualified is virtually impossible. *See Maddox*, 764 F.2d at 1547 (citing *Crawford v. Western Elec. Co.*, 614 F.2d 1300, 1315 (5th Cir. 1980). However, where possible, it is "within a district court's role and capabilities" to "assess whether

(continued...)

thus shifts to Knight Ridder to proffer legitimate nondiscriminatory reasons for its employment decision. *See Damon v. Fleming Supermarkets of Florida*, 196 F.3d 1354, 1361 (11th Cir. 1999). The Court finds that Knight Ridder has come forward with legitimate non-discriminatory reasons. Knight Ridder states that Mr. Reyes was paid more than Ms. Townsend because he had more experience and was better qualified than Ms. Townsend and that Ms. Townsend was not promoted because she lacked certain skills required of a Reporter 4.

Once Knight Ridder meets its burden of showing a legitimate business reason for its actions, the *McDonnell Douglas* framework, with its presumptions and burdens, drops out of the case, and Ms. Townsend has the ultimate burden of producing sufficient evidence to persuade the trier of fact that Knight Ridder intentionally discriminated her. (sic) *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). For the same reasons as noted in Section IV.B of this order, the Court finds that Ms. Townsend has failed to provide any evidence that Knight Ridder's reasons were pretextual or otherwise

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(...continued)
the subjective employment qualification was bona fide and whether the employer's testimony that the plaintiff did not possess the qualification was credible." *Hill v. Seaboard Coast Line R.R.*, 885 F.2d 804, 809 (11th Cir. 1989). Because the requirements for Reporter 4 include subjective elements, the Court will assume that Ms. Townsend meets the qualification prong for the prima facie test. This is not to say that the Court finds that Ms. Townsend was "qualified" for the promotion, but rather that her qualifications will be considered for purposes of Knight Ridder's legitimate business reason for its decision.

motivated by a discriminatory motive. Therefore, Knight Ridder's motion for summary judgment on Counts III & V of Ms. Townsend's amended complaint is GRANTED.

VI. Retaliation

Knight Ridder moves for summary judgment on Ms. Townsend's claims for retaliation under the EPA, Title VII, and the Florida Civil Rights Act. Implicitly conceding that there are no issues of material fact to be tried, Ms. Townsend cross-moves for summary judgment on these claims. *See* Plaintiff's Response to Defendants' Motion for Summary Judgment at 16 [D.E. 91] (Nov. 1, 1999). Retaliation claims under the EPA and FCA are construed in accordance with case law interpreting retaliation claims under Title VII. *See Harper v. Blockbuster Entertainment Corp.*, 139 F.3d 1385, 1387, 1389 (11th Cir. 1998) (decision construing Title VII retaliations claims guide the analysis of retaliation claims under the Florida Civil Rights Act); *EEOC v. Reichold Chem., Inc.*, 988 F.2d 1564, 1571-72 (11th Cir. 1993) (applying Title VII analysis to plaintiff's retaliation claims under the Equal Pay Act and Title VII).

To state a claim for retaliation, a plaintiff must show (1) that she engaged in statutorily protected expression; (2) that she suffered an adverse employment action; and (3) that there is some causal relationship between two events. *See Holifield*, 115 F.3d at 1566. An employee is engaged in statutorily protected expression where she has engaged in one of the following types of protected activity: (1) opposing an employment practice made unlawful by Title VII ("opposition clause"); or (2) "ma[king] a charge, testif[ying], assist[ing], or participat[ing] in any manner in an investigation, proceeding, or hearing" under Title VII ("participation

clause"). *Clover v. Total System Servs., Inc.*, 176 F.3d 1346, 1351 (11th Cir. 1999). In this case, it is undisputed that Ms. Townsend's protects falls under the opposition clause of Title VII.

To state a claim for retaliation under the opposition clause, Ms. Townsend must show that she had a good faith, reasonable belief that Knight Ridder was engaged in unlawful employment practices. *See Little v. United Tech., Carrier Transicold Div.*, 103 F.3d 956, 960 (11th Cir. 1997). Ms. Townsend need not prove her underlying claim of discrimination which lead to her protect. *See Tipton v. Canadian Imperial Bank of Commerce*, 872 F.2d 1491, 1494 (11th Cir. 1989; *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406, 1411 (9th Cir. 1987). Such a requirement "'[w]ould not only chill the legitimate assertion of employee rights under Title VII but would tend to force employees to file formal charges rather than seek conciliation of informal adjustment of grievances.'" *Little*, 103 F.3d at 960 (quoting *Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978); *see also Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1140 (5th Cir. 1981). Nevertheless, it "is insufficient for a plaintiff 'to allege [her] belief in this regard was honest and bona fide. . . .'" *Harper v. Blockbuster Entertainment Corp.*, 139 F.3d 1385, 1388 (11th Cir. 1988) (citation omitted). Although the conduct opposed need not actually constitute a discrimination claim, it "must be close enough to support an objectively reasonable belief that it is." *Clover*, 176 F.3d at 1351; *see Tipton*, 872 F.2d at 1494; *Jurado*, 813 F.2d at 1411.

"The objective reasonableness of an employee's belief that her employer has engaged in an unlawful employment practice must be measured against existing substantive law." *Clover*, 176 F.3d at 1351. For example,

with respect to claims for sexual harassment, a plaintiff's complaints of harassment are not objectively reasonable where the harassing and discriminatory conduct is far from rising to the level of constituting a hostile work environment. *See id.* (holding that plaintiff's belief that co-worker sexually harassed her was not objectively reasonably where co-worker made frequent visits to plaintiff's work area, called her on her beeper during work hours, hung up the phone on everyone except plaintiff, and responded to plaintiff is a "flirting kind of style"); *Santiago v. Lloyd*, 66 F. Supp. 2d 282, 287 (D.P.R. 1999) (finding that comments by co-worker that plaintiff was employer's "girlfriend" and that plaintiff was "turning into a bitch" were insufficient to show an objectively reasonable belief of sexual harassment). In other scenarios, courts have found that a plaintiff has failed to engage in statutorily protect(sic) activity because the alleged discriminatory acts could not be imputed to the employer. *See Little*, 103 F.3d at 960; *Barham v. State of N.Y. Unified Court SYS.*, 1998 WL 107117, at *3-4 (S.D.N.Y. 1998). Finally, where the alleged acts are simply not the types of acts actionable under the discrimination laws, the complaint of discrimination is not objectively reasonable. *See Harper*, 139 F.3d at 1388 n.2 (holding that plaintiff's belief that employer's grooming policy, which prohibited men from wearing long hear, was discriminatory was not objectively reasonable in light of long history of precedent holding to contrary); *Harvey v. Chevron U.S.A., Inc.*, 961 F. Supp. 1017, 1033 (S.D. Tex. 1997) (holding that female plaintiff's belief of sex discrimination was not objectively reasonable where she alleged that her male employer favored another female who was employer's paramour).

Here, Knight Ridder does not deny that Ms. Townsend's protests were made in good faith. Knight

Ridder does argue, however, that her protests of discrimination were not objectively reasonable. After reviewing the facts of this case in light of the legal principles embodied in the EPA and Title VIII, the Court finds that Ms. Townsend's claims of discrimination were not objectively reasonable. Ms. Townsend's claims for wage discrimination and failure to promote are based entirely on her own belief that her job is comparable to that of Mr. Reyes and that she therefore should have been promoted to Reporter 4. Yet, Ms. Townsend concedes that she knew little about Mr. Reyes' background and day-to-day activities before she brought this lawsuit. Mr. Reyes works for a different publication, travels internationally for his stories, and has specialized knowledge and contacts in his field of Latin American journalism. Ms. Townsend, although a commendable local reporter, has not demonstrated any such specialized skills or additional efforts in her job. Furthermore, Ms. Townsend offers no evidence outside of her own assertions to counter her supervisors' unanimous opinion that she is not ready to be promoted to Reporter 4. Her supervisors gave specific reasons for denying her promotion and even offered to assist her on improving on her weaknesses. In sum, there is nothing in the record that ties her supervisors' decision to sex discrimination.[4]

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[4] Mr. Ibarqüen's alleged statement — "I will not tolerate you accusing us of discriminating against you. You first brought a sexual harassment complaint. Now discrimination. What's next?" — is not probative of Ms. Townsend's underlying wage discrimination and her failure to promote claims. Rather, this statement is evidence showing there was a causal link between Ms. Townsend's complaints of discrimination and her termination. Accordingly, the Court will not consider the

(continued...)

No rational jury could find Ms. Townsend's belief that her opposition to Mr. Reyes' higher position and pay constituted opposition to an unlawful employment practice to be objectively reasonable. Consequently, Knight Ridder did not retaliate against her as a matter of law under Title VII, the EPA, or the FCA.

Accordingly, the defendants' motion for summary judgment on Counts II, IV & VI is GRANTED and Ms. Townsend's cross-motion for summary judgment on these counts is DENIED.

VII. Conclusion

Having considered the facts of the case in the light most favorable to Ms. Townsend, the Court finds that Ms. Townsend has failed to show that there is an issue of material fact regarding her claims of sex discrimination, and that the defendants are entitled to summary judgment as a matter of law. Accordingly, the defendants' motion for summary judgment [D.E. 70] is GRANTED. All other pending motions are DENIED AS MOOT, and any scheduled hearings or conference are CANCELED. This case is CLOSED.

(...continued)
statement for purposes of determining whether Ms. Townsend's beliefs were objectively reasonable.

As noted above, because Ms. Townsend's complaints of discrimination were not objectively reasonable, and therefore not protected opposition under Title VII, she fails the first prong of the retaliation prima facie test. Thus, the Court need not consider Mr. Ibarqüen's statement in determining whether Ms. Townsend has met the other prongs of that test.

DONE and ORDERED in chambers in Miami, Florida this 31st day of January 2000.

Supreme Court, U.S.
FILED
FEB 16 2001
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No. 00-1166

In The

Supreme Court of the United States

ROSA M. TOWNSEND,

Petitioner,

v.

KNIGHT-RIDDER, INC. and
THE MIAMI HERALD PUBLISHING CO.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

SANFORD L. BOHRER
Counsel of Record
LUCINDA A. HOFMANN
HOLLAND & KNIGHT LLP
701 Brickell Avenue
Miami, Florida 33131
(305) 374-8500

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

23 pp

RESTATEMENT OF THE QUESTION PRESENTED

Whether this Court should review the Eleventh Circuit's per curiam affirmance without opinion of an unpublished district court's summary final judgment where the standard applied by the district court was in accord with the law of the Eleventh Circuit and the majority of the other circuits.

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

Respondent Knight-Ridder, Inc. is a publicly-held company and the parent of respondent The Miami Herald Publishing Company.

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RESPONDENTS' BRIEF IN OPPOSITION

This Court should deny the Petition for Writ of Certiorari, which seeks review of the Eleventh Circuit's per curiam affirmance without opinion of the unpublished summary final judgment entered by the district court.

RESTATEMENT OF THE CASE

Ms. Townsend's Evaluation and Termination

From June 1988 until May 1998, Rosa Townsend was a local political news reporter for *el Nuevo Herald*, a Spanish language insert to *The Miami Herald*, a major metropolitan newspaper. The two newspapers were, and are, operated as separate entities. Their newsrooms are located on separate floors and are managed by different editors. The staffs are different; the budgets are separate; and all hiring, firing, and promotion decisions are made independently by the supervisors at the two respective papers.

In the Fall of 1997, Ms. Townsend's supervisor, Assistant City Editor Gladys Nieves, began to prepare Ms. Townsend's performance evaluation. Ms. Nieves left *el Nuevo Herald* before completing it, so Ms. Townsend's new supervisor, Mr. Cabaleiro, and his boss, Mr. Casares, the City Editor, finished the evaluation. They then met with Ms. Townsend in early March 1998 to discuss it and give her a raise. The meeting took two hours. The evaluation reflected that Ms. Townsend had both strengths and weaknesses: her supervisors described her as hard working, aggressive, and initiating with good research skills

and good instincts. But they also wrote that she had problems organizing her time, writing concisely and clearly, and working with her peers and as part of a team. She needed to become a leader, coach less experienced reporters, anchor more stories, complete her stories more quickly, and diversify her writing style and written product. She was given a 6.5% salary increase.

Ms. Townsend did not agree with her evaluation. She did not believe that she had deficiencies or needed to improve. She did not accept the criticisms and refused to sign the evaluation. Instead, she demanded a promotion from Reporter 3 to Reporter 4, the highest classification for reporters at *el Nuevo Herald*.

After the meeting, Mr. Casares consulted with his superiors at *el Nuevo Herald*, Mr. Fabricio, the Managing Editor, and Ms. Gutierrez, the Executive Editor, regarding Ms. Townsend's evaluation and promotion demand. They confirmed that Ms. Townsend's evaluation, raise, and job classification were fair and appropriate.

A day or two after her evaluation, Ms. Townsend went to see the Publisher, Alberto Ibargüen, to complain. She told him that her evaluation was wrong and unfair, that Mr. Casares was plotting with Ms. Gutierrez to ruin her career, and that Mr. Casares' arrogant management style was bad for the newspaper. She also claimed that the reason Gerardo Reyes (a reporter for *The Miami Herald*) was a Reporter 4 but she was only a Reporter 3 was because she was a woman. Mr. Ibargüen responded that he did not believe that her evaluation and job classification, which had been unanimously approved by the

entire chain of command, were discriminatory. He nonetheless promised to discuss the evaluation with her editors.

Mr. Ibargüen spoke to Ms. Townsend's editors, as he had promised. As a result, the next month, in April 1998, Mr. Casares and Mr. Fabricio met with Ms. Townsend. They presented to her a memorandum they had prepared (and which reflected the unanimous position of all of her supervisors) outlining the improvements she would need to make to be promoted. They promised to support her and to help her reach her goal of becoming a Reporter 4. During this unprecedented, two-hour meeting, Ms. Townsend was extremely emotional; she was also hostile and disrespectful to Mr. Casares, referring to him at one point as being "incompetent." She repeatedly said things such as "I can't accept this," "This is unacceptable to me," and "I will not take it." When Mr. Fabricio reported this meeting to his boss, Ms. Gutierrez, she told him he should have terminated Ms. Townsend "on the spot" for "insubordination."

Ms. Townsend went to see Mr. Ibargüen to complain – again. This time she told him that the conditions "imposed" on her were intolerable and that she would not work under them. She did not mention *The Miami Herald* reporter, Gerardo Reyes, or make any reference to discrimination. After this meeting, Mr. Ibargüen again spoke with the editors, who, again, all agreed that Ms. Townsend's evaluation and the decision not to promote her were fair.

A few weeks later, Ms. Townsend returned from vacation and went to see Mr. Ibargüen for a third time.

He told her that it was the consensus of the three editors that she was properly categorized as a Reporter 3 and that no one perceived there to be any mistreatment of her. When she questioned him about her "alternatives," he told her that if she could not accept her evaluation and her supervisors' offers of help, he would, with disappointment, accept her resignation.

After this meeting, Mr. Fabricio told Mr. Ibargüen that he did not believe that Ms. Townsend would ever accept her evaluation or accept Mr. Casares as her boss and that he believed that she would be a continuing disruption in the newsroom. He added that he thought she should be terminated. Ms. Gutierrez told Mr. Ibargüen that she had reached the same conclusion. The three managers then determined that, due to Ms. Townsend's adamant refusal to accept her evaluation and the "conditions" for promotion and because of her ultimatum that she would not work unless she was made a Reporter 4, they would terminate her employment.

The Lawsuit and Summary Judgment

Ms. Townsend sued the newspaper, pleading, among other things, discrimination and retaliatory discharge. She alleged that she was just as qualified as Gerardo Reyes, a male, international reporter for *The Miami Herald*, who was classified as a Reporter 4. Although she claimed that Mr. Reyes was her "comparator," she admitted that she knew very little about what he did. His affidavit, filed in support of the defendants' motion for summary judgment, showed that there was ***no comparison*** between his job and Ms. Townsend's. She was a

reporter of local Miami politics and politicians. The focus of his reporting was international – not local – and required him to travel extensively to South and Central America and Mexico. His job required an extensive knowledge of Latin American government and politics, contacts at high levels of government and business, knowledge of the countries' cultures and legal systems (Reyes was a lawyer in Colombia), and highly placed, credible sources, official and otherwise. He had won the highest prize awarded in the United States to Hispanic journalists and three times had won the highest prize given in Colombia for investigative journalism. And he had authored the only Spanish language book written on investigative journalism in Latin America. As the district court noted, "Ms. Townsend did not present any evidence that her job required specialized knowledge or skills comparable to those required for Mr. Reyes' position." (App. to Pet. at 14a.)

The defendants moved for summary judgment because, among other grounds, Ms. Townsend had failed to present sufficient evidence to support a *prima facie* case on any of her discrimination and retaliation claims and because, even if she had, she could not rebut *el Nuevo Herald's* legitimate and non-discriminatory reasons for firing her.

The district court granted the defendants' summary judgment motion in a sixteen-page, unpublished opinion. The district court concluded, among other things, that Ms. Townsend had failed to prove a *prima facie* case of retaliation because her

> claims of discrimination were not objectively reasonable. Ms. Townsend's claims for wage discrimination and failure to promote are based entirely on her own belief that her job is comparable to that of Mr. Reyes and that she therefore should have been promoted to Reporter 4. Yet, Ms. Townsend concedes that she knew little about Mr. Reyes' background and day-to-day activities before she brought this lawsuit. Mr. Reyes works for a different publication, travels internationally for his stories, and has specialized knowledge and contacts in his field of Latin American journalism. Ms. Townsend, although a commendable local reporter, has not demonstrated any such specialized skills or additional efforts in her job. Furthermore, ***Ms. Townsend offers no evidence outside of her own assertions to counter her supervisors' unanimous opinion that she is not ready to be promoted to Reporter 4***. Her supervisors gave her specific reasons for denying her promotion and even offered to assist her on improving on her weaknesses. In sum, ***there is nothing in the record that ties her supervisors' decisions to sex discrimination***. (App. to Pet. at 24a; emphasis added.)

The Eleventh Circuit – without opinion and without dissent – affirmed.

REASONS FOR DENYING THE WRIT

Petitioner claims that there is a "split" between the Tenth and the Eleventh Circuits on the standard to be applied when determining whether a plaintiff has met her burden of showing a *prima facie* case of retaliation.

She claims that the Eleventh Circuit (although it affirmed without opinion) applied the objective "good faith, reasonable belief" standard to her retaliation claim, while the Tenth Circuit would have applied a subjective "mistaken, good faith belief" standard.

This Court should deny Ms. Townsend's petition for several reasons. First, the Eleventh Circuit's per curiam affirmance ***without opinion*** of the district court's unpublished summary final judgment did not "conflict" with published Tenth Circuit decisions. Second, the district court, in its ***unpublished order***, merely applied the standard that is well established in the Eleventh Circuit and widely accepted by most of the other federal courts, including at least two Tenth Circuit panels. And finally, even if the district court had applied to Ms. Townsend's retaliation claim the subjective good faith standard used by Tenth Circuit judges, the result would have been the same because *el Nuevo Herald's* reasons for terminating her were legitimate, nondiscriminatory, and unrebuttable.

I.

The Eleventh Circuit's Per Curiam Affirmance Without Opinion Did Not Create A Conflict

Disappointed that her nonmeritorious discrimination and retaliation claims were rejected by the district and the circuit courts below, the petitioner, by asserting that the Eleventh Circuit's per curiam affirmance of the summary judgment against her "conflicts" with Tenth Circuit rulings, hopes to entice this Court to intercede. But the Eleventh Circuit simply affirmed the district court; it did not say why. While a fair inference to be drawn from the

Eleventh Circuit's decision is that it approved of the district court's application of the objective good faith, reasonable belief standard to Ms. Townsend's retaliation claim, the fact remains that it is just an inference. And even the petitioner does not claim that the decision in this case necessarily stands for that or any other proposition. Instead she relies on Eleventh Circuit decisions in *other cases* to provide the basis for conflict. Thus, neither the record nor the Petition supports Ms. Townsend's assertion that a conflict exists between the decision of the Eleventh Circuit in this case and any other circuit court decision.

II.

The Standard the Courts of the Eleventh Circuit Apply When Determining Whether a Plaintiff Has Met Her Burden of Proving a Prima Facie Case of Retaliation Is the Same Standard the Majority of the Federal Courts Apply and That Two Panels of the Tenth Circuit Have Applied

"Title VII prohibits an employer from discriminating against an employee who has opposed what she believes to be unlawful discrimination." *Tipton v. Canadian Imperial Bank of Commerce*, 872 F.2d 1491, 1494 (11th Cir. 1989) (citing 42 U.S.C. § 2000e-3(a) (1981)). To meet her burden of proving a *prima facie* case of retaliatory discharge under the "opposition" clause of Title VII, 42 U.S.C. § 2000e-3(a), a plaintiff must show that (1) she engaged in protected opposition to discrimination; (2) she was terminated simultaneously with or subsequent to such opposition; and (3) there was a causal link between the

protected opposition and the termination. *Tipton*, 872 F.2d at 1494.

To meet the first prong of her *prima facie* case the plaintiff must show that her opposition to the perceived discrimination is "protected." *Id.* In the Eleventh Circuit this burden is met if the plaintiff "could ***reasonably*** form a ***good faith*** belief that the discrimination in fact existed." *Id.* (emphasis added). *See also Clover v. Total Sys. Servs., Inc.*, 176 F.3d 1346, 1351 (11th Cir. 1999) (noting that "an employee who seeks protection under the opposition clause must have a 'good faith, reasonable belief' that her employer has engaged in unlawful discrimination"); *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1454 (11th Cir. 1998) (ruling that employee "had a good faith, reasonable basis" for filing her EEOC charge); *Harper v. Blockbuster Entm't Corp.*, 139 F.3d 1385, 1388 (11th Cir.) (ruling that plaintiffs' belief that employer's grooming policy violated Title VII's prohibition against sex discrimination "was not reasonable"), *cert. denied*, 525 U.S. 1000 (1998); *Rollins v. State Dept. of Law Enforcement*, 868 F.2d 397, 400 (11th Cir. 1989) (recognizing that 42 U.S.C. § 2000e-3(a) "shields an employee from retaliation regardless of the merit of her complaints so long as she can show ***a good faith, reasonable belief*** that the challenged practices violate Title VII") (emphasis added).

The Eleventh Circuit, in *Little v. United Technologies, Carrier Transicold Div.*, 103 F.3d 956 (11th Cir. 1997), emphasized that the good faith, reasonable belief showing required for a retaliation claim under Title VII's opposition clause has "both a subjective and an objective component." *Id.* at 960. The court explained:

> A plaintiff must not only show that [s]he subjectively (that is, in ***good faith***) believed that h[er] employer was engaged in unlawful employment practices, but also that h[er] belief was ***objectively reasonable*** *in light of the facts and record presented.*

Id. (emphasis added).

An employee need not prove the underlying claim of discrimination that allegedly led to her "opposition." *Tipton*, 872 F.2d at 1494; *Little*, 103 F.3d at 960 (concluding that a plaintiff "need not prove the underlying discriminatory conduct that [s]he opposed was actually unlawful in order to establish a prima facie case and overcome a motion for summary judgment"). Thus, when determining whether a plaintiff has met her *prima facie* case, the courts need only determine that the plaintiff's alleged perception that the employer engaged in discriminatory conduct was reasonable in light of the surrounding facts and circumstances – and honest; the plaintiff need not prove that her employer actually discriminated.

The "good faith, reasonable belief" standard that the Eleventh Circuit applies in opposition cases is the one the majority of federal circuit courts apply. *See, e.g., Sarno v. Douglas Elliman-Gibbons & Ives, Inc.*, 183 F.3d 155, 159 (2d Cir. 1999) (holding that "a plaintiff need not establish that the conduct he opposed was actually a violation of [Title VII] so long as he can establish that he possessed a 'good faith, reasonable belief that the underlying challenged actions of the employer violated that law' ") (citations omitted); *Reed v. A.W. Lawrence & Co.*, 95 F.3d 1170, 1180 (2d Cir. 1996) (affirming jury's finding that plaintiff "reasonably and in good faith believed that she had been the

victim of a species of sex discrimination"); *Manoharan v. Columbia Univ. Coll. of Physicians & Surgeons*, 842 F.2d 590, 593 (2d Cir. 1988) (stating that "the plaintiff must demonstrate a 'good faith, reasonable belief that the underlying challenged actions of the employer violated the law' ") (citations omitted); *Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 429 (5th Cir. 2000) (affirming district court's finding that plaintiff failed to present sufficient evidence showing that his alleged complaints of race discrimination were ***objectively reasonable***); *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1140 (5th Cir. 1981) (adopting the "reasonable belief test" and concluding that "a plaintiff can establish a prima facie case of retaliatory discharge under the opposition clause of section 704(a) if he shows that he had a ***reasonable belief*** that the employer was engaged in unlawful employment practices") (emphasis added); *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 579 (6th Cir.) (stating that "[u]nder Title VII, an employee is protected against employer retaliation for opposing any practice that the employee ***reasonably believes*** to be a violation of Title VII") (emphasis added), *cert. denied*, 121 S. Ct. 657 (2000); *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, 707 (7th Cir. 2000) (observing that terms of opposition clause are met "if the plaintiff has a sincere and ***reasonable belief*** that he is opposing an unlawful practice") (emphasis added); *Rucker v. Higher Educ. Aids Bd.*, 669 F.2d 1179, 1182 (7th Cir. 1982) (noting that in a retaliation case, "it is good faith ***and reasonableness***, not the fact of discrimination, that is the critical inquiry") (emphasis added); *Evans v. Kansas City, Mo. Sch. Dist.*, 65 F.3d 98, 100

(8th Cir. 1995) (stating that "[t]o demonstrate the presence of protected opposition, a plaintiff must show a good faith reasonable belief that his employer engaged in a discriminatory employment practice"), *cert. denied*, 517 U.S. 1104 (1996); *Sisco v. J.S. Alberici Constr. Co.*, 655 F.2d 146, 150 (8th Cir. 1981) (concluding that a person in the plaintiff's position could "reasonably have believed" that discrimination in violation of the law had occurred); *Moyo v. Gomez*, 40 F.3d 982, 985 (9th Cir. 1994) (stating that the reasonableness of the plaintiff's belief that "an unlawful employment practice occurred must be assessed according to an objective standard"), *cert. denied sub nom. California Dept. of Corrections v. Moyo*, 513 U.S. 1081 (1995); *Learned v. City of Bellevue*, 860 F.2d 928, 932 (9th Cir. 1988) (reasoning that "the opposition clause, by its terms, protects only those employees who oppose what they reasonably perceive as discrimination"), *cert. denied*, 489 U.S. 1079 (1989); *Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978) (reasoning that "[w]hen an employee reasonably believes that discrimination exists, opposition thereto is opposition to an employment practice made unlawful by Title VII even if the employee turns out to be mistaken as to the facts").

The petitioner cites to an unpublished Tenth Circuit opinion, *Shinwari v. Raytheon Aircraft Co.*, 215 F.3d 1337, 2000 WL 731782 (10th Cir. June 8, 2000), *cert. denied*, 121 S. Ct. 843 (2001), which relies on a 1984 Tenth Circuit case, *Love v. Re/Max of Am., Inc.*, 738 F.2d 383 (10th Cir. 1984), in which that court summarily noted without analysis that other courts had concluded that "opposition activity is protected when it is based on a mistaken good faith belief that Title VII has been violated" and then

"agree[d] that a good faith belief is sufficient" to state a retaliation claim under the opposition clause, even if the conduct opposed is not in fact unlawful. 738 F.2d at 385. Last year, in *Shinwari*, the Tenth Circuit confirmed that it applies only a subjective standard to the plaintiff's perceptions, not the "objectively reasonable" standard. 2000 WL 731782, at **5. Yet in the same year, the same court in another unpublished opinion, *Robben v. Runyon*, 203 F.3d 836, 2000 WL 123421 (10th Cir. Feb. 1, 2000), affirmed a district court that had reasoned that "[a] retaliation claim may be premised on adverse employment decisions which are in retaliation for opposition to discrimination, even if no discrimination in fact existed, so long as the plaintiff was motivated by an ***objectively reasonable belief*** the conduct was illegal." *Id.*, at **4 (emphasis added). And in yet another unpublished opinion, *Mann v. Hutchinson Public Schs.*, 202 F.3d 282, 1999 WL 1092594 (10th Cir. Nov. 23, 1999), the Tenth Circuit interpreted *Love v. Re/Max* as requiring the courts to apply an objective standard to the plaintiff's stated belief:

> To prevail on the first prong [of a *prima facie* case of retaliation], [the plaintiff] must show that she had a ***good faith, reasonable belief*** that she was being subjected to unlawful discrimination. *See Love v. Re/Max of Am., Inc.*, 738 F.2d 383, 385 (10th Cir. 1984) ("opposition activity" is protected even when based on mistaken good faith belief). Thus, [the plaintiff] must show that, at the time she told her supervisor . . . she thought he was discriminating against her, the actions she complained of were ones she ***reasonably*** could have believed had been taken due to her sex.

1999 WL 1092594, at **2 (emphasis added). Given that the standard the Tenth Circuit applied in *Robben* and *Mann* is the same standard that the district court applied to the petitioner's claim and is the same standard the majority of circuit courts apply, it can hardly be said that a "split" between the Tenth and Eleventh Circuits exists requiring this Court's intervention.

As the district court below concluded, Ms. Townsend's "belief" that she was not promoted to Reporter 4 because of "being a woman" was not objectively reasonable in light of the facts and record presented. *See Little*, 103 F.3d at 960. Ms. Townsend was barely acquainted with Gerardo Reyes, her so-called "comparator." She hardly knew what he did at *The Miami Herald*, a separate newspaper. Ms. Townsend's written performance evaluation reveals that, although she was considered a good reporter, she needed to improve her writing, leadership, and interpersonal skills. ***All*** of her editors said so. Thus, even if Ms. Townsend could have subjectively believed that her "sex" had something to do with not being promoted, a reasonable person in her position would have recognized that she didn't get a promotion because she didn't deserve one.

III.

The Eleventh Circuit, In Its Per Curiam Affirmance Without Opinion, Did Not Decide An "Important Question of Federal Law"

For the same reasons that it cannot be said that a conflict exists between the decision of the Eleventh Circuit in this case and any other circuit court decision, it

cannot be said that the Eleventh Circuit in this case "decided" an important question of federal law concerning retaliation. The Eleventh Circuit wrote no opinion and thus it is not possible to tell what, if anything, it "decided." Moreover, as the cases cited in Point II make clear, federal circuit courts have – for two decades – applied the good faith, reasonable belief standard to retaliation claims brought under the opposition clause. Thus, even if it could be said that the Eleventh Circuit by inference approved the district court's application of this standard, the decision to apply an objective standard when determining whether a plaintiff has met her burden of proving a *prima facie* case of retaliation was made years ago – in other cases.

CONCLUSION

For the foregoing reasons, Respondents ask that this Court deny the Petition.

Respectfully submitted,

SANFORD L. BOHRER, ESQUIRE
Counsel of Record

and

LUCINDA A. HOFMANN, ESQUIRE
HOLLAND & KNIGHT LLP
701 Brickell Avenue
Miami, Florida 33131
(305) 374-8500

Counsel for Respondents,
Knight-Ridder, Inc. and
The Miami Herald Publishing Co.

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No. 00-1166

In The

Supreme Court of the United States

ROSA M. TOWNSEND,

Petitioner,

vs.

KNIGHT-RIDDER, INC. and THE MIAMI HERALD PUBLISHING CO.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

WILLIAM R. AMLONG
Counsel of Record
AMLONG & AMLONG, P.A.
Attorneys for Petitioner
500 Northeast Fourth Street
Second Floor
Ft. Lauderdale, FL 33301
(954) 462-1983

5 pp

To meet Petitioner's arguments concerning important issues of workplace law — whether there is a division amongst the circuits concerning the standard to be used in retaliation cases, and whether the approach of the Court of Appeals for the Eleventh Circuit is out of synch with the remedial approach that this Court always has taken on similar issues — Respondents make three arguments, none of which is either responsive or valid.

First, in their "Restatement of the Case," Brief in Opposition at 1-6, they sidestep the district court's statement of its sole rationale for granting summary judgment against Petitioner on her retaliation claims, i.e., that her belief that she was the victim of employment discrimination, ***albeit in good faith***, was not objectively reasonable. *See* App. 23a-25a. Respondents instead argue with great vigor their version of the disputed facts concerning whether *el Nuevo Herald* and *The Miami Herald* are separate establishments, Brief in Opposition at 1, whether Petitioner really was performing as well as she contends, *id.* at 1-3, whether Respondents had good reasons for firing Petitioner other than her complaining about sex discrimination, *id.* at 3-5, and even whether her discrimination claims (concerning which certiorari is not sought) really had merit. *Id.* at 4-5. Such a refocus obscures and ignores the overarching issue here: does federal workplace law demand a retaliation standard that protects any worker who raises her voice in good faith complaint, as opposed to only those whose complaint can be viewed in hindsight to have been objectively reasonable.

Second, Respondents argue essentially that the division between the circuits on that issue is not really that big of a division because only the Court of Appeals for the Tenth Circuit is out-of-step with the Eleventh Circuit's objective reasonableness standard. Respondents do not deny that the

standard articulated in *Jeffries v. State of Kansas*, 147 F.3d 1220 (10th Cir. 1998) and *Love v. Re/Max of Am., Inc.*, 738 F.2d 383 (10th Cir. 1984) is diametrically opposed to that followed within the Eleventh Circuit and in what Respondents characterize as "the majority of federal circuit courts..." Brief in Opposition, at 10. Respondents seek to minimize the importance of the *Jeffries/Love* standard by pointing to what they characterize as inconsistent applications of its good-faith-only requirement. They acknowledge, however, that a panel of the Tenth Circuit relied specifically upon that standard last year in *Shinwari v. Raytheon Aircraft Co.*, 215 F.3d 1337 (Table), 2000 WL 731782 (10th Cir. June 8, 2000), *cert. denied*, 121 S.Ct. 843. Respondents fail to note that the *Shinwari* court used the *Jeffries/Love* standard to reverse a summary judgment in which the district court had specifically relied upon the objectively reasonable standard articulated in *Little v. United Technologies, Carrier Transicold Division*, 103 F.2d 956, 960 (11th Cir. 1997), the first case in which the Court of Appeals for the Eleventh Circuit clearly articulated that standard. Rather than even attempt to address the split between the objective-reasonableness standard used in the instant case and the more recent published articulation of the *Love* standard in *Jeffries*, Respondents characterize the unpublished *Shinwari* opinion as relying solely on the 1984 *Love* case. Brief in Opposition, at 12-13. This obscures the current vitality of the Tenth Circuit's good-faith-only standard. It was upon both *Love* and *Jeffries*, however, that the *Shinwari* panel relied when it stated that the district court, granting summary judgment based upon Eleventh Circuit authority, had "mischaracterized our standard when it stated that the belief that antidiscrimination law has been violated must not only be subjectively in good faith, but objectively reasonable..." In summary, the conflict hardly could be sharper or more current.

Third, Respondents argue that because the district court's lengthy opinion was not published, and because the appeals court affirmed it *per curiam* and without an opinion, it does not merit certiorari. Brief in Opposition at 14-15. This argument ignores history. Among this Court's decisions that have arisen from review of *per curiam* affirmances are those in *Blum v. Stenson*, 465 U.S. 886 (1984)[1] and *Connick v. Myers*, 461 U.S. 138 (1983).[2] This Court reviewed a *pèr curiam* affirmance recently in *Carter v. United States*, 530 U.S. 255 (2000),[3] in which a 5-4 majority of the Court abrogated contrary published opinions of two other courts of appeal. As noted in *Smith v. United States*, 502 U.S. 1017 (1991), Blackmun, J., dissenting from denial of certiorari,

> The fact that the Court of Appeals' opinion is unpublished is irrelevant. Nonpublication must not be a convenient means to prevent review. An unpublished opinion may have a lingering effect in the Circuit and surely is as important to the parties concerned as is a published opinion.

Id. at 1020, n. 1.

The case at bar is one which concerns an important federal issue, not the disputed evidentiary minutiae of summary judgment. The issue — whether workers will be subjected to retaliation without recourse for voicing objections to what they in good faith perceive to be violations of federal workplace legislation — is one on which the Courts of Appeal for the

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[1] *See Stenson v. Blum*, 671 493 (2nd Cir. 1981) (Table).

[2] *See Myers v. Connick*, 654 F.2d 619 (5th Cir. 1981) (Table).

[3] *See United States v. Carter*, 185 F.3d 863 (3rd Cir. 1999) (Table).

Tenth and Eleventh Circuits sharply disagree. The unpublished character of the Court of Appeals' *per curiam* affirmance of the district court's opinion is irrelevant.

This Court should grant certiorari.

Respectfully submitted,

WILLIAM R. AMLONG
Counsel of Record
AMLONG & AMLONG, P.A.
Attorneys for Petitioner
500 Northeast Fourth Street
Second Floor
Fort Lauderdale, Florida 33301
(954) 462-1983